IN THE COURT OF APPEALS OF THE STATE OF ALASKA

EDWARD V. HAILSTONE, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11442 Trial Court No. 2KB-11-746 CR MEMORANDUM OPINION No. 6294 — March 2, 2016

Appeal from the Superior Court, Second Judicial District, Kotzebue, Ben Esch, Judge.

Appearances: Glenda Kerry, Law Office of Glenda J. Kerry, Girdwood, for the Appellant. Eric Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Coats, Senior Judge.[*]

Senior Judge COATS.

Edward V. "Chip" Hailstone was convicted of two counts of perjury and two counts of providing false information with the intent of implicating another in an

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

offense.[1] He raises five claims of error: (1) that there was insufficient evidence supporting his convictions, (2) that the trial judge should have *sua sponte* identified which of Hailstone's statements were allegedly false, (3) that all of his convictions should have merged because it was not clear which statements the jury found were false, (4) that the trial judge should have granted Hailstone's motion for a new trial based on newly discovered evidence, and (5) that it was error to admit into evidence an email Hailstone sent to the state troopers.

For the reasons explained in this decision, we find no error and therefore affirm Hailstone's convictions.

Background

Because Hailstone challenges the sufficiency of the evidence to support his convictions, we present the evidence in the light most favorable to the jury's verdicts.[2]

On July 17, 2011, the village public safety officer in Noorvik contacted the Alaska State Troopers to report a fight involving several people and various weapons. A number of people, including Hailstone's stepson, Jonathon Carter, and Hailstone's daughter, Tinmiaq Hailstone, were involved.

Alaska State Troopers Christopher Bitz and Gordon Young flew to Noorvik that morning. They investigated various accusations made by the people who were present at, or who were aware of, the fight. Ultimately, a number of people were arrested. Among those arrested was Carter, who was charged with cutting a person with

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[1] AS 11.56.200 and AS 11.56.800(a)(1)(A), respectively.

[2] *Richards v. State*, 249 P.3d 303, 304 (Alaska App. 2011).

a knife. Hailstone's daughter, Tinmiaq, who was also involved in the fight, claimed that the person Carter cut had pointed a rifle at her. In addition to Carter, the troopers arrested four others, including Jack Wells, the person who had pointed a rifle at Tinmiaq.

Later on the morning of the incident, Hailstone, his wife, and his daughter Tinmiaq walked into the public safety building while the troopers were processing the people they had arrested. Hailstone and his wife were upset because the troopers had not spoken to them to get information about the fight. Because the Hailstones were angry, yelling, and combative, Trooper Young asked them to step outside.

At trial, Trooper Bitz testified that, when the elder Hailstones arrived at the public safety building, they were loudly telling the troopers that their son and daughter had been confronted by people with weapons. The Hailstones asserted that the fight was caused by these other people who had come after their children.

When Trooper Bitz explained that the Hailstones' version of events was contradicted by other witnesses — in particular, other witnesses had reported that the Hailstone children had wielded weapons and had attacked other people in the fight — all three Hailstones began yelling at Bitz, emphasizing that someone had pointed a rifle at Tinmiaq.

During this confrontation between the Hailstones and the troopers, Tinmiaq moved her hand in a manner that made both Bitz and Young believe that she was going to strike Bitz "right in the chest." Both troopers moved to prevent this, but Bitz acted first, deflecting and grabbing Tinmiaq's arm, turning her, and then holding her arm off to her side and slightly behind her back.

According to the troopers, Bitz had not, until then, initiated any confrontation with Tinmiaq or the elder Hailstones, nor had he placed his hand on his firearm at any time during the encounter. Bitz testified that he had not raised his voice while talking with the Hailstones, and was standing still with his arms either crossed in

front of him or with his hands on his hips. Bitz also testified that he was not moving when Tinmiaq attempted to hit him.

Bitz released Tinmiaq seconds after he grabbed her arm, and Young took her to the side to interview her away from her parents.

Following this incident, the elder Hailstones continued to yell at Bitz, using profanity, concerning how the two thought the troopers should be handling the earlier fight. Bitz told Hailstone to calm down and that if his conduct continued, he could be arrested for disorderly conduct and jailed. Bitz testified that he did not move towards the Hailstones during this discussion, nor did he put his hand on his firearm. The Hailstones eventually calmed down.

The next day, Hailstone began to make the false statements about Bitz's conduct that resulted in the four charges in this case. We discuss the facts underlying each count below.

The series of events leading to Hailstone's indictment

On July 18, Hailstone sent an email in which he falsely accused Bitz of assaulting Tinmiaq during the troopers' interaction with the Hailstones at the public safety building. Among other things, Hailstone demanded that the Department of Public Safety file a criminal charge against Bitz for that assault. In this email, Hailstone falsely claimed that Bitz had advanced on Tinmiaq, purposely entered her personal space, and physically assaulted her, causing her "serious pain."

Hailstone further falsely claimed that Trooper Young had interceded to stop Bitz from inflicting further pain on Tinmiaq, and that Young had then physically moved Bitz away from Tinmiaq. Hailstone also asserted that Bitz had placed Hailstone and his wife in imminent fear for their lives by placing his hand on his gun "like he was going to draw it while assaulting [Hailstone's] daughter." Hailstone went on to falsely state

that Young apologized to the Hailstones for Bitz's actions. The July 18 email was the basis for Count II, providing false information with the intent to implicate another person in an offense.

On July 20, Hailstone applied for short-term and long-term protective orders, falsely claiming that Bitz was stalking Hailstone's family and had assaulted his daughter. On July 20, Hailstone testified under oath before a magistrate judge in support of his request for the short-term order. He testified about the events that had occurred at the public safety building, falsely stating that Bitz had advanced on and attacked his daughter and did not stop until Young physically intervened, grabbed Bitz, and "marched" him away. He also testified that Bitz, while glaring at them, had threatened Hailstone and his wife with his gun. Hailstone falsely claimed that Young had apologized to him for Bitz's actions, and Hailstone swore that a restraining order was necessary to protect his family from Bitz.

The magistrate judge granted Hailstone's request for a short-term order. This testimony was the basis for Count I, perjury.

In response to Hailstone's allegations, the Alaska Bureau of Investigation appointed Trooper Investigator Joshua Rallo to investigate Hailstone's allegations. Rallo did not know the Hailstones or Bitz. Rallo traveled to Noorvik and interviewed Hailstone, Tinmiaq, and other witnesses.

Hailstone told Rallo that during the incident, Bitz advanced on Tinmiaq until he was in her personal space — "within inches" — and then assaulted her by grabbing her arm and putting her into a wrist lock. He told Rallo that Young immediately grabbed Bitz and moved in between the Hailstones and "the assaulting trooper." He also claimed that Young physically removed Bitz's hands off of Tinmiaq and then moved Bitz away from her. Hailstone further claimed that Bitz was "going for his gun" when Young moved Bitz away from Tinmiaq. Rallo ultimately determined that

no charges against Bitz were warranted. Hailstone's statements to Rallo were the basis for Count III, providing false information with the intent to implicate another person in an offense.

Two weeks later, on August 8, Hailstone testified before a superior court judge in support of his petition for a long-term protective order against Bitz. Once again, under oath, he repeated most of the false allegations he had made earlier about Bitz's behavior. He again testified that Bitz had assaulted his daughter and that Young physically removed Bitz from Tinmiaq. Hailstone claimed that Bitz repeatedly placed his hand on his gun while pointing to his badge in such a way that Hailstone and his wife felt they were in "extreme danger." He testified that Bitz was in a "stance for firing on us," and that Bitz taunted the Hailstones with a gun for five minutes. He stated that the long-term protective order was needed because Bitz was "going to use his gun and ... going to kill one of us." The superior court judge denied the request for a long-term order. Hailstone's testimony at this hearing was the basis for Count IV, perjury.

Finally, on December 15, Hailstone sent another email to the Alaska State Troopers. In this email, Hailstone stated that Bitz had stalked Tinmiaq "with his eyes fixxed [sic] on my daughter['s] breasts, [and with] a noticeable erection." Hailstone further stated that Bitz had "the intent to make bodily contact with her." In other words, Hailstone implied that during the altercation in July, Bitz had basically attempted to make sexual contact with Tinmiaq. No criminal charge was brought in association with this email, but the email was admitted at trial under Alaska Evidence Rule 404 to show Hailstone's motive and intent regarding his previous statements.

Hailstone's trial and conviction

Hailstone went to trial charged with two counts of perjury and with two counts of providing false information with the intent of implicating another person in an

offense. At trial, Young and Bitz testified, as did Hailstone's wife and daughter, among others. Hailstone did not testify, but his defense was that all of his former testimony and statements had been truthful. The jury convicted him of all four counts.

After trial but before sentencing, Hailstone moved for a new trial based on newly discovered evidence. He presented a report with an expert's opinion that the audio recording from Trooper Young's recorder had been "interrupted" for eleven seconds — that is, the expert thought it likely that the recording had been paused for eleven seconds. Superior Court Judge Ben Esch orally denied the motion at the sentencing hearing, finding that the jury would not have changed its verdicts based on this evidence.

Discussion

Hailstone's convictions are supported by sufficient evidence

Hailstone first claims that none of the four convictions was supported by sufficient evidence. In particular, he argues that there was no evidence that he knowingly made false statements.

When reviewing a claim that convictions are not supported by sufficient evidence, we view the evidence, and all reasonable inferences to be drawn from the evidence, in the light most favorable to upholding the verdicts.[3] Viewing the evidence in this fashion, we must decide "whether a fair-minded juror exercising reasonable

[3] *Richards v. State*, 249 P.3d 303, 304-05 (Alaska App. 2011).

judgment could conclude that the State had met its burden of proving guilt beyond a reasonable doubt."[4] Issues of credibility are for the jury.[5]

Hailstone was charged with perjury and with providing false information with the intent to implicate another person in an offense. Under AS 11.56.200(a), a person commits perjury if the person makes a false sworn statement which the person does not believe to be true.[6] Under AS 11.56.800(a)(1)(A), a person commits the crime of "false information or report" if the person knowingly gives false information to a peace officer with the intent of implicating another in an offense.[7]

Hailstone asserts that the State did not prove that he knowingly made false statements about Bitz's and Young's actions. Instead, Hailstone argues that he voiced his "opinion" when describing the incident between Bitz and Tinmiaq.

The State's evidence included a copy of Hailstone's July 18 email, a transcript of his testimony before the magistrate judge, his statement to Investigator Rallo, and a transcript of his testimony before the superior court judge. The evidence also included the testimony of Bitz, Young, and Investigator Rallo, and the troopers' audio recordings of the incident.

Bitz and Young never denied that Bitz, to prevent Tinmiaq from striking him, grabbed her arm and put her in a wrist hold. To that end, it is true that Hailstone

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[4] *Collins v. State*, 977 P.2d 741, 747 (Alaska App. 1999) (citing *Dorman v. State*, 622 P.2d 448, 453 (Alaska 1981)).

[5] *Simpson v. State*, 877 P.2d 1319, 1320 (Alaska App. 1994) (citing *Anthony v. State*, 521 P.2d 486, 492 (Alaska 1974) (holding that "[t]he assessment of witness credibility is exclusively within the province of the jury")); *Brown v. Anchorage*, 680 P.2d 100, 104 (Alaska App. 1984).

[6] Perjury is a class B felony. AS 11.56.200(c).

[7] False information or report is a class A misdemeanor. AS 11.56.800(b).

saw Bitz physically grab his daughter's arm. But at trial, the troopers denied that Bitz approached and unlawfully assaulted Tinmiaq. They also denied that Young had to intervene to stop Bitz, that he moved Bitz away from the Hailstones, and that he apologized for Bitz's behavior.

To prove that Hailstone knowingly falsely accused Bitz of an assault, the State argued that Hailstone provided the other false statements to corroborate his assault accusation. In other words, the State pointed out that Hailstone must have been aware that what he had witnessed was not an unlawful assault, so he added other false statements to bolster his claim.

The evidence at trial showed that each of the four statements that formed the basis of the charges against Hailstone included the accusation that Bitz advanced into Tinmiaq's personal space, then assaulted her by grabbing her arm and putting her into a hold, causing her pain. Each statement included the claim that Trooper Young immediately interceded, physically stopped Bitz, and then moved Bitz away from Tinmiaq and the Hailstones. Three of Hailstone's statements included the claim that Young then apologized to the Hailstones for Bitz's assault.

The troopers testified that Hailstone's statements describing his version of what happened were false. Additionally, the jury heard both troopers' audio recordings of the incident. Although Hailstone's witnesses offered accounts that contradicted the troopers, it was up to the jury to weigh all the evidence and to determine the credibility of the witnesses.[8]

Viewed in the light most favorable to upholding the verdict, this evidence was sufficient to allow fair-minded jurors exercising reasonable judgment to conclude

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[8] *Simpson*, 877 P.2d at 1320.

that the State had met its burden of proving Hailstone guilty of all four charges beyond a reasonable doubt.[9]

The superior court did not commit plain error by failing to identify for the jury which of Hailstone's statements the State claimed were false

Hailstone next asserts that the superior court committed plain error because it did not identify for the jury which of Hailstone's statements were allegedly false. (Hailstone's attorney did ask for, and did receive, an instruction telling the jurors that they had to unanimously agree as to which of Hailstone's statements were false, but this instruction did not list the specific statements that the State alleged were false.)

Because Hailstone did not raise this objection when the parties discussed jury instructions, he must now show plain error. To meet this burden, Hailstone must show, among other things, that error actually occurred, that it was not the result of trial counsel's knowing waiver, that the error was obvious (in that it would have been apparent to any competent judge or attorney), and that the error manifestly compromised the fairness of Hailstone's trial.[10]

Hailstone faced four different counts, each count based on Hailstone's activities on a separate day. With respect to each of these counts, the gist of the State's allegation was that Hailstone falsely stated that Trooper Bitz had assaulted Tinmiaq, and that Bitz's behavior was so obviously unlawful that Trooper Young physically interceded to stop the assault. In closing argument, the statements that the prosecutor identified as false were: that Bitz advanced on Tinmiaq; that Trooper Young had to pull Bitz off of

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[9] *Dorman*, 622 P.2d at 453.

[10] *See Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

Tinmiaq; that Young apologized to the Hailstones for Bitz's misconduct; and that Bitz glared at and taunted Hailstone and his wife.

The State argued that one of these false statements was critical to Hailstone's offenses — that Young interceded to stop Bitz's assault. In the State's view, this statement was critical because it was made to corroborate Hailstone's false accusation that an assault occurred.

As already set out, the evidence showed that Hailstone repeated these falsehoods in each of the statements he made under oath or to law enforcement (although he did not tell Investigator Rallo that Young had apologized). Hailstone faced four charges, one for each time he provided false information or testified falsely under oath — July 18, July 20, July 22, and August 8. To resolve each of these charges, the jury was provided with the full text of Hailstone's corresponding statements or testimony.

The jury was instructed on the elements of each of the perjury and false information charges. For each of the four counts, the judge instructed the jurors that they "must unanimously agree as to the specific statement that has been proved to be intentionally false." He also instructed the jury that

> [a] separate offense is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.
>
> As you consider each count, if you find that the state has proved each element of that offense beyond a reasonable doubt, then you must find the defendant guilty on that count. If, however, you find that the state has not proved each element of that offense beyond a reasonable doubt, then you must find the defendant not guilty on that count.
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> To return a verdict of guilty or not guilty on a count, each of you must agree with that verdict.

Hailstone does not claim that the trial judge incorrectly defined the elements of perjury or the elements of providing false information. And, as we explained earlier, the judge instructed the jurors that they had to be unanimous as to which of Hailstone's statements were false.

Hailstone claims that the jury may have been confused as to which particular statements the State claimed were false. But in light of the instructions provided to the jury and the way in which the State argued its case in closing, it is clear that the jury ultimately looked at the statements Hailstone made on each of the four separate days charged, and agreed that on each occasion, Hailstone made knowingly false statements with the intent to implicate Trooper Bitz in a crime.

We therefore conclude that Hailstone has not shown plain error.

Merger is not required as a remedy to the above failure to instruct

As a remedy for the court's failure to instruct the jury on which of Hailstone's statements were allegedly false, Hailstone claims that all four convictions must merge into a single conviction. He contends that merger is required under the double jeopardy doctrine because it is impossible to know which statements the jury found were false. He argues that when it cannot be determined what facts the jury relied on to support each conviction, merger is required.

But here, it is clear that Hailstone made separate statements on four different days, two of them under oath. Additionally, the State clearly linked specific statements to specific dates. Because of this, it can be determined what facts the jury relied on to support each conviction. Hailstone was convicted and punished for four distinct criminal acts. Under these circumstances, we conclude that merging the convictions is not required under the double jeopardy clause.

The superior court did not err when it denied Hailstone's request for a new trial

Both Trooper Young and Trooper Bitz audio recorded the incident with the Hailstones. At trial, Hailstone's attorney and at least one of Hailstone's witnesses stated that they believed that the audio recordings had been altered and that portions of the incident had been removed.

Prior to trial, Hailstone gave the recordings to an expert to determine whether they had been altered. After examining the recordings, the expert reported that he could not determine that any alteration had occurred. Hailstone's attorney decided not to pursue this further — that is, the attorney did not look for a different expert to examine the recordings.

After trial, however, Hailstone submitted the recordings to another expert. This expert believed that Trooper Young's recording had been "interrupted" for eleven seconds. That is, the expert stated that on the day of the incident in Noorvik, Young's recorder had most likely been "paused" for eleven seconds. The expert found no signs of alteration in Bitz's recording.

Based on the eleven-second interruption on Young's recording, Hailstone moved for a new trial, claiming the "pause" was newly discovered evidence. He contended that this evidence substantially impeached the troopers' testimony. But the part of the audio where the pause occurred was played a number of times during Hailstone's wife's testimony, during which she testified that she could hear that the background sound from a passing airplane changed abruptly. This was the portion of the recording that the expert was asked to focus on after trial.

In response to Hailstone's motion, the State argued that the motion was not based on newly discovered evidence. The State also argued that the eleven-second pause occurred forty minutes after the incident between Bitz and the Hailstones. Based on this,

the State contended that even if the court addressed the merits of Hailstone's motion, evidence that the audio was paused for eleven seconds would not have appreciably affected the jury's verdicts.

The judge ruled orally on the merits of Hailstone's motion at the beginning of the sentencing proceeding. And although he accepted "the representations of counsel that some expert decided there's some amount of ... missing time from the recording," the judge nonetheless denied the motion. He explained that "without a better ability to coordinate and consolidate where that [gap] came in the nature of the discussions [with witnesses] and what was recording ... I just can't find that it would necessarily affect the decision of the jury and result in a changed verdict."

Although the judge's ruling invited Hailstone to present further evidence, Hailstone did not do so, nor did he ask for additional time to do so. Additionally, Hailstone concurred with the State's response as to when the pause occurred. Finally, Hailstone did not make a proffer as to what evidence he believed was actually missing because of the eleven-second pause.

As just explained, the discussion during which the pause occurred came near the end of the troopers' investigation. Young's recording is one hour and twenty-six minutes long, and the interruption occurred at 1:13:48. This portion of the recording involved a discussion between Young and Hailstone about the purchase of a snow machine and Hailstone's concern that Bitz was rude. When the parties addressed the issue at sentencing, Hailstone did not contradict the State's assertion concerning the content of that portion of the recording where the pause occurred.

On appeal, Hailstone argues primarily that evidence of a break in the recording would have enhanced the credibility of the defense witnesses because Hailstone's wife testified that she thought the recording had been altered somehow. But as the State responds, because the missing eleven seconds is at best impeachment

evidence, even if it qualified as newly discovered evidence, it was insufficient to support Hailstone's request for a new trial.[11]

There was no evidence that the recording was actually altered — rather, Hailstone's expert believed that, most likely, the pause button was activated during the eleven seconds. Thus, it seems highly unlikely that an eleven-second pause that occurred long after the altercation at issue would have changed the outcome of the trial.[12] We therefore conclude that the superior court did not err when it denied the motion for a new trial.

The superior court did not err when it admitted Hailstone's December 15 email

Hailstone's final claim is that the superior court erred when it admitted Hailstone's December 15 email to the Department of Public Safety. Hailstone argues that this email was not relevant for any non-propensity reason. In the alternative, he argues that the court's failure to conduct a balancing test under Alaska Evidence Rule 403 was reversible error because whatever relevance the email possessed was outweighed by its potential for unfair prejudice. Hailstone also contends that the prosecutor misused this evidence during the State's closing argument to the jury by relying on it to suggest that Hailstone was dishonest. (As we have already noted, the State did not charge Hailstone with a separate count of providing false information based on this email.)

Hailstone's attorney filed a written response to the State's request to admit the email, but he did not claim the evidence was not relevant — nor is it clear from the

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[11] *See Lampley v. Anchorage*, 159 P.3d 515, 526 (Alaska App. 2007).

[12] *Id.* (noting that a motion for new trial based on newly discovered evidence must show *inter alia*, that this evidence "would probably produce an acquittal").

trial record that he objected to the evidence under Alaska Evidence Rule 404(b)(1). In fact, Hailstone's attorney conceded that the State had a "valid point about admission [of the email] on rebuttal ... [s]hould the defense suggest that Mr. Hailstone accidentally uttered false statements due to emotional distress." Hailstone's attorney also agreed that the email would be admissible if his defense at trial was "that he made an unintentional mistake for any other reason."

When the State, just prior to trial, asked for a ruling on its motion to admit the email, Hailstone did not offer any additional objection. The superior court then ruled that it would allow the State to introduce the email into evidence. (The State did not move to admit the document until later in the trial, and at that time, it was admitted without objection.) In short, the record does not show that Hailstone offered any objection that would require the court to analyze the email under either Rule 403 or Rule 404(b)(1).

Evidence Rule 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith." But such evidence is "admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The State moved to offer the email as "evidence of motive, intent, and absence of mistake." Although the court did not expressly address Rule 403, the record shows it did so implicitly.

In addressing the admissibility of the December 15 email, the State argued that the email showed that Hailstone intentionally lied, and was not merely mistaken, when he sent the first email on July 18 to the Alaska State Troopers. The State contended that the December 15 email showed that Hailstone had "progressively increased his exaggeration of the events." Hailstone did not address this argument when

he replied to the State's motion. In light of this record, it is clear to us that the court implicitly found this email admissible because it was both relevant and more probative than prejudicial.

We agree with the trial judge that the jury could draw from the email a reasonable inference about Hailstone's knowledge or intent in the present case. The email showed Hailstone's intent to implicate Bitz in a criminal offense by accusing him of committing misconduct more serious than Hailstone initially claimed regarding the altercation between Bitz and Tinmiaq — that is, the email amounted to a claim that Bitz had made, or had attempted to make, an unwanted sexual contact with Tinmiaq. Moreover, despite Hailstone's argument in his brief, the email was not an unrelated bad act. To the contrary, the email was directly related to the incident and Hailstone's false accusations. We conclude that the trial court did not err when it admitted the email.

As for Hailstone's related claim that the prosecutor made an improper argument, Hailstone made no objection at trial. Because he made no objection, Hailstone must show plain error.

Here, the jury was clearly instructed as to how it was to consider the December 15 email. The jury was instructed that it could not consider the email "to prove that the defendant is a person of bad character or that he has a tendency to lie." The jury was instructed that it could consider the evidence "only for the limited purpose of deciding if it tends to show proof of the defendant's motive, intent, or absence of mistake concerning the charged crimes."

The prosecutor argued in his rebuttal that the email showed that Hailstone was, on December 15, making new accusations that he had not made earlier, thus tending to show that Hailstone was willing to invent new false accusations to get Bitz in trouble. This was a reasonable inference from the evidence.

The jury is ordinarily presumed to follow the court's instructions.[13] Hailstone has provided no reason for us to believe the jury in this case did not do so.

Conclusion

The judgment of the superior court is AFFIRMED.

[13] *See Bradley v. State*, 197 P.3d 209, 216 (Alaska App. 2008) (citing *Knix v. State*, 922 P.2d 913, 923 (Alaska App. 1996)).